UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. H-01-3624 And Consolidated Cases
This Document Relates To:	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	

DEFENDANT BANK OF AMERICA CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Gregory A. Markel (GM-5626)
(Attorney-in-Charge)
Ronit Setton (RS-2298)
Nancy Ruskin (NR-2428)
Stephen M. Knaster (Cal. Bar 146236)
Brobeck, Phleger & Harrison LLP
1633 Broadway, 47th Floor
New York, NY 10019
Telephone: (212) 581-1600
Facsimile: (212) 586-7878

Paul R. Bessette
Texas Bar No. 2263050
S.D. Tex. Bar No.: 22453
Brobeck, Phleger & Harrison LLP
4801 Plaza on the Lake
Austin, Texas 78746
Telephone: (512) 330-4000
Facsimile: (512) 330-4001

Charles G. King
Texas Bar No. 11470000
S.D. Tex. Bar No.: 01344
King & Pennington LLP
711 Louisiana Street,
Suite 3100
Houston, Texas 77002
Telephone: (713) 225-8404
Facsimile: (713) 225-8488

Attorneys for Defendant
Bank of America Corporation

665

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

Defendant Bank of America Corporation ("Bank of America")[1] respectfully submits this brief in support of its motion to dismiss the Consolidated Complaint ("Complaint") in the *Newby* Action pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 (the "Reform Act").

PRELIMINARY STATEMENT

The Complaint should be dismissed as to Bank of America because the conclusory allegations relating to Bank of America do not come close to meeting the pleading requirements of Rule 9(b) and the Reform Act, which require Plaintiffs to plead with particularity their claims against each defendant.[2] The Complaint in this lawsuit describes at length the allegedly pervasive accounting fraud at Enron and the now widely publicized role of Enron's auditors, Arthur Andersen LLP ("Andersen") in failing to uncover or disclose that fraud. Unlike the earlier complaints which only named as defendants Enron, its officers, directors and accountants, the Complaint has in conclusory terms added nine investment and commercial banks, including Bank of America, as defendants.[3] Since Enron is in bankruptcy and Andersen is in financial distress, it is obvious that the Bank Defendants have been added because of their deep pockets.

---

[1] Plaintiffs name Bank of America as a defendant and defines it as including its subsidiary Banc of America Securities LLC. Cplt. ¶ 104. For the purpose of this motion to dismiss, Bank of America will use the same term to refer to both companies although, contrary to the allegations of the Complaint, Bank of America Corporation was not a participant in any of the alleged transactions and should therefore be dismissed. *See infra* Point I.

[2] Under these pleading requirements, each defendant is entitled to be apprised of the claims against it. Plaintiffs have deliberately made it difficult to understand how the varied roles of each bank defendant constitutes actionable conduct under the securities laws. Sorting out the issues now by determining if Plaintiffs have met their burden will serve the interests of justice and efficiency.

[3] Defendants JP Morgan Chase & Co., CitiGroup, Inc., Credit Suisse First Boston Corporation, Canadian Imperial Bank of Commerce, Merrill Lynch & Co., Inc., Barclays PLC, Deutsche Bank AG and Lehman Brothers Holding, Inc. (collectively, along with Bank of America, the "Bank Defendants") have submitted separate motions to dismiss.

Despite the addition of the Bank Defendants, virtually all of Plaintiffs' specific allegations pertain to Enron, the Enron insiders and Enron's auditor, Andersen. Only a small fraction of the Complaint is devoted to allegations directed at "the banks" and/or "the bankers" as an undifferentiated group, and only a tiny subset of those allegations are specifically aimed at Bank of America. Those allegations fail to show that Bank of America did anything more than provide the services that commercial and investment banks routinely provide for their clients. The fact that the allegations against Bank of America are so weak demonstrates that the only reason Bank of America is a party to this litigation is Plaintiffs' keen interest in a solvent defendant.

Since the Complaint is entirely devoted to fraud allegations, Plaintiffs are required by the Reform Act and Rule 9(b) of the Federal Rules of Civil Procedure to support their claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act") and Sections 11 and 15 of the Securities Act of 1933 ("1933 Act") with particularized facts. Instead, Plaintiffs allege:

- *No facts showing that Bank of America knew or could have known of Enron's alleged fraudulent conduct;*
- *No facts showing how Bank of America obtained any such knowledge;*
- *No facts showing that Bank of America participated in Enron's allegedly fraudulent scheme;*
- *No facts showing that Bank of America benefited from any such participation;*
- *No facts showing Bank of America's knowledge of Enron's actual financial condition during the purported class period;*
- *No facts showing how Bank of America obtained any such knowledge;*
- *No facts showing that Bank of America made any material misrepresentations or omissions; and*
- *No facts showing that Bank of America had knowledge of the falsity of any alleged misstatements at the time they were made.*

Moreover, the allegation that it was in Bank of America's interest to participate in the alleged fraud is preposterous. Putting aside the potential damage to its reputation and

business generally, it would be irrational for Bank of America to expose itself to hundreds of millions of dollars of losses on loans to a company it supposedly knew was a financial "house of cards." Plaintiffs' theory strains credulity past the breaking point.

The action against Bank of America should be dismissed for numerous reasons. First, the Complaint should be dismissed because Bank of America Corporation is not a proper defendant.

Second, Plaintiffs' Section 10(b) claim should be dismissed on the grounds that the Complaint fails to comply with the particularity requirements of Rule 9(b) and the Reform Act. No facts are alleged, for example, showing specific false statements made by Bank of America in the challenged Registration Statements or analyst reports, how they were misleading, why they were false when made, or how Bank of America knew they were false. Nor do Plaintiffs plead with particularity Bank of America's alleged involvement in a scheme to defraud.

The Section 10(b) claim against Bank of America should also be dismissed as a matter of law because Plaintiffs plead no facts in support of a strong inference of scienter as required by the Reform Act.

In addition, Plaintiffs' Section 10(b) allegations regarding Bank of America's participation in Enron's alleged fraudulent scheme are merely aiding and abetting or conspiracy allegations in disguise, and are accordingly not actionable under the federal securities laws. The Complaint also fails to plead a primary violation of Section 10(b) against Bank of America by failing to attribute to it any misstatement in any Registration Statement, and by failing to plead facts showing it played a significant role in drafting or editing any of the alleged misstatements included therein.

Plaintiffs' Section 10(b) claim premised on alleged misstatements in analyst reports should also be dismissed because Bank of America does not owe a general duty to the marketplace with respect to research reports sent to its clients.

Third, since no proposed representative plaintiff purchased notes in the 8.375% Notes offering at *any* time, Plaintiffs' Section 10(b) and Section 11 claims with respect to that offering must be dismissed because Plaintiffs do not have standing to assert those claims with respect to that offering.

Fourth, the Section 11 claim against Bank of America, which is alleged with respect to a 1) May 19, 1999 offering of 7.375% Notes, 2) an August 10, 1999 offering of 7% Exchangeable Notes, and 3) a May 18, 2000 offering of 8.375% Notes and a June 1, 2000 offering of 7.875% Notes[4] should be dismissed on a number of grounds.

Plaintiffs' Section 11 claim, which is governed by Rule 9(b) because it sounds in fraud, fails to state with particularity *any* alleged misstatement by Bank of America in *any* Registration Statement or the alleged inadequacy of its due diligence investigation. The Complaint also fails to state a Section 11 claim with respect to the June 2000 7.875% Notes offering because Bank of America was not an underwriter of that offering. The Section 11 claim based on the August 1999 Enron 7% Exchangeable Notes offering should also be dismissed because the plaintiff purporting to represent the sub-classes for this offering did not purchase notes in the initial offering and therefore lacks standing. In addition, since the proposed representative plaintiff for the 7% Exchangeable Notes offering purchased notes more than two years after the offering, plaintiffs are unable to plead actual reliance on the prospectus for the offering.

---

[4] Plaintiffs do not accurately characterize these offerings. Although they list Bank of America as a "defendant underwriter" with respect to an alleged May 18, 2000 $500 million offering of 8.375% Notes and 7.875% Notes (Cplt. ¶¶ 776, 1006), Bank of America was not an underwriter with respect to the $325,000,000 7.875% Notes offering, which took place on June 1, 2000. Rather, Bank of America was only involved in the $175,000,000 8.375% Notes offering which took place on May 18, 2000. This is established by the shelf prospectus, pricing supplement and supplemental prospectus attached to the Appendix filed concurrently with this brief. *See* Appendix Exhs. 1, 2; *infra* Point IV.B.

Finally, the control person allegations under Sections 15 and 20(a) fail because Bank of America did not have the power to control Enron, the individual Enron defendants or Andersen, the alleged primary violators.

STATEMENT OF FACTS

Plaintiffs' 500 page Complaint alleges a litany of alleged wrongdoing by Enron, including the establishment of sham partnerships, improper accounting practices and falsified earnings figures. Conspicuously absent are any facts showing that Bank of America was aware of any of these alleged misdeeds, participated in them or benefited from them in any way.

In lieu of such particularized facts, Plaintiffs allege that Bank of America knew of Enron's alleged fraud by virtue of its "extensive" relationships with Enron and the "intimate interaction" between Bank of America officials and Enron top executives. Cplt. ¶¶ 774, 784. Plaintiffs do not identify which Bank of America officials had these relationships or interactions, the nature of the relationships or interactions, when and where the interactions took place, or what information was exchanged. *Id.*

- **The Public Offerings**

The Complaint alleges that Bank of America was the underwriter of certain Enron securities offerings between November 1997 and July 2001. Cplt. ¶¶ 776-80. Plaintiffs assert liability under Section 11 and Section 10(b) for alleged misstatements by Bank of America in Registration Statements issued in connection with four offerings – those dated May 19, 1999, August 10, 1999, May 18, 2000 and June 1, 2000. *See* Cplt. ¶¶ 612-613, 773, 781-782, 1006. Although the Complaint is not entirely clear, Plaintiffs may also seek to hold Bank of America liable under Section 10(b) for purported statements in Registration Statements issued in connection with various additional offerings. *See* Cplt. ¶¶ 48, 49, 612-617, 776-778. Any claims with respect to four of the transactions, however, are time-barred. In addition, Plaintiffs fail to identify alleged misstatements by Bank of America in *any* of the Registration Statements. *See* Cplt. ¶¶ 121-393 (purportedly setting forth "The Class Period Events and False Statements," but failing to offer a single alleged misstatement from the challenged Registration Statements); Cplt.

¶¶ 612-41 (purportedly setting forth "Enron's False and Misleading Statements in its 10-Ks and Registration Statements," but failing to specify a single alleged misstatement by Bank of America in the Registration Statements from each of the offerings). Nor do Plaintiffs explain why the (unidentified) alleged misstatements were false, provide any factual basis for concluding they are attributable to Bank of America, or describe in any detail Bank of America's participation in the offerings and Registration Statements. *See id.*

Rather than identify specific misstatements by Bank of America in any of the Registration Statements, Plaintiffs make blanket allegations about "the offering documents" collectively, failing to distinguish among the various banks and Registration Statements, and offering no facts to demonstrate Bank of America's involvement with the alleged financial fraud. *See* Cplt. ¶¶ 612-41. Similarly, rather than set forth facts showing that Bank of America knew of the falsity of the alleged misstatements, Plaintiffs make generalized allegations against all of the Bank Defendants. *See, e.g.*, ¶¶ 617, 619, 651. Plaintiffs allege that the banks "were in a unique position to know" the falsity of the alleged misstatements (Cplt. ¶617), but provide no facts showing such knowledge. Instead, Plaintiffs improperly rely entirely on the business relationship between Enron and the banks and the banks' status as investment and commercial bankers. *See* Cplt. ¶¶ 619, 784.

Plaintiffs make similarly generalized allegations against Bank of America concerning its due diligence in connection with the offerings. *See* Cplt. ¶ 1013 ("[t]he underwriters did not make a reasonable and diligent investigation, nor did they possess reasonable grounds for the belief that the statements contained in the registration statements...were true"). The Complaint offers no facts regarding the scope of Bank of America' due diligence and no description as to how Bank of America's due diligence was inadequate. *Id.*

Plaintiffs also allege that "the proceeds of Enron's securities offerings during the Class Period underwritten by Bank of America or other investment banks were utilized in significant part to repay Enron's existing commercial paper and bank indebtedness, including

indebtedness to Bank of America" and that Bank of America collected substantial "investment banking fees" as a result of its underwriting services to Enron. Cplt. ¶ 780. Plaintiffs provide no facts showing that Enron used the proceeds from offerings underwritten by Bank of America to reduce indebtedness to Bank of America, no facts showing the amounts or dates of such repayments, no facts showing which proceeds from which offerings were so utilized, and no facts showing the overall level of indebtedness to Bank of America. Nor do Plaintiffs offer even a ballpark estimate for the amount of the alleged "investment banking fees" Bank of America collected from Enron.

- **The Analyst Reports**

Between September 30, 1999 and October 16, 2001, Bank of America issued a number of analyst reports regarding Enron. Cplt. ¶¶ 173, 182, 185, 193, 195, 203, 233, 252, 255, 258, 265. Plaintiffs allege that these reports "contained false and misleading statements concerning Enron's business, finances and financial condition and its prospects." Cplt. ¶ 782. However, the Complaint does not identify which portions of the reports are false and misleading or explain why they were false when made. *See* Cplt. ¶¶ 121-393. The excerpted portions consist largely of announcements made by Enron, quotes from Enron officials, and recommendations by Bank of America analysts. *See, e.g.*, Cplt. ¶¶ 173, 200, 233. Plaintiffs do not allege any facts showing that Bank of America was aware of Enron's alleged wrongdoing, or that it did not believe the statements contained in the analyst reports. Nor do Plaintiffs set forth any factual basis for inferring that Bank of America benefited from alleged misstatements in the analyst reports, or that such misstatements furthered Enron's alleged fraudulent scheme.

- **The Loans, Credit Facilities and other Transactions**

According to Plaintiffs, Bank of America "participated in over $4 billion in loans and credit facilities to Enron or Enron-related entities." Cplt. ¶ 779. The Complaint refers to four such loans and credit facilities, one of which predates the class period. *Id.* Plaintiff alleges that Bank of America's involvement in these loans and credit facilities constituted active engagement in Enron's allegedly fraudulent course of conduct. *Id.* However, other than

providing approximate dates and amounts, the Complaint is silent with respect to the alleged loans. Plaintiffs do not set forth any facts showing Bank of America's degree of involvement in the loans and credit facilities, how the facilities furthered Enron's allegedly fraudulent scheme, or showing that Bank of America had any fraudulent intent in extending the loans and credit facilities. Plaintiffs likewise provide no facts showing whether Enron actually made use of the alleged credit facilities, and in what amount.

Plaintiffs allege that Bank of America received "huge fees and interest payments for those loans and syndication services." Cplt. ¶780. The Complaint, however, does not specify the amount of the allegedly "huge fees," nor does it describe with any specificity why such fees would be sufficient motivation for Bank of America to violate the securities laws and risk millions of dollars on an enterprise it allegedly knew was nothing more than a "Ponzi scheme." *See, e.g.*, Cplt. ¶¶ 25, 780.

Plaintiffs further allege that Bank of America helped Enron "structure and finance certain of the illicit SPEs and partnerships Enron controlled," including the LJM2 SPE. Cplt. ¶¶ 774, 785. With the sole exception of LJM2, Plaintiffs fail to provide any information whatsoever concerning Bank of America's role in the alleged "illicit SPEs and partnerships." As to LJM2, Plaintiffs allege that Bank of America officials "were permitted to invest some $45 million" as a reward for its participation in Enron's alleged fraudulent scheme. Cplt. ¶ 785.[5] Notably, the Complaint does not identify the officials, the dates of their alleged investments, the terms and conditions of their investments, or the returns (if any) they realized on their investments. Nor do Plaintiffs set forth facts showing that Bank of America was involved in the structuring or formation of LJM2, or that Bank of America's participation in LJM2 furthered Enron's allegedly fraudulent scheme.

---

[5] The factual allegations of the Complaint concerning Bank of America are totally without basis. For example, the assertion that Bank of America officials were permitted to invest $45 million in LJM2 is simply wrong. For purposes of this motion only, Bank of America will not contest these assertions because the Court is required to accept them as true.

The Complaint never attempts to explain why it merely notes that Bank of America served as the underwriter for the July 1999 offering of common stock of Enron Oil & Gas at $22.25 a share and as a co-underwriter for the issuance of Azurix stock in June 1999. Cplt. ¶¶ 49, 777, 778. Although the Complaint makes allegations relating to *Enron's* conduct with respect to Azurix, it fails to describe any conduct or statements by Bank of America. The Enron Oil & Gas transaction is never even mentioned outside one-line entries in charts. In any event, this company, which was renamed EOG Resources Inc. in 1999 when it became independent from Enron, currently trades above $40 a share. Appendix Exh. 3.

ARGUMENT[6]

I. BANK OF AMERICA CORPORATION IS NOT AN APPROPRIATE DEFENDANT

Plaintiffs' pervasive attempt to avoid distinguishing the role and actions of separate entities is exemplified by their naming a parent holding company – Bank of America Corporation – rather than operating corporations which it directly or indirectly owns. All of the claims against Bank of America Corporation should be dismissed because Bank of America Corporation is not an appropriate defendant. Plaintiffs tacitly concede that the substantive allegations in the Complaint relate to conduct of the subsidiaries of Bank of America Corporation. Cplt. ¶ 104.

Although Plaintiffs allege that Bank of America Corporation controlled subsidiaries "such as Banc of America Securities" (Cplt. ¶ 104), this vague, unsubstantiated

---

[6] Although this Court must accept all well-pled allegations as true solely for purposes of ruling on this motion to dismiss, it need not evaluate Plaintiffs' "conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *McNamara v. Bre-X Minerals Ltd.*, 57 F.Supp.2d 396, 402 (E.D. Tex. 1999). In ruling on this motion, the Court may consider matters subject to judicial notice, such as filings with the SEC and stock prices. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-1018 (5th Cir. 1996); *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 881-882 (S.D. Tex. 2001) ("The Court may also consider documents 'integral to and explicitly relied on in the complaint,' that the defendant appends to his motion to dismiss") (citing *Phillips v. LCI Int'l., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)); *Lemmer v. Nu-Kote Holdings, Inc.*, No. CIV. A. 398CV0161L, 2001 WL 1112577, at *1 n.1 (N.D. Tex. Sept. 6, 2001) (court may consider stock prices on a motion to dismiss).

allegation is insufficient to make Bank of America Corporation liable for alleged violations of the securities laws by its subsidiaries. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (it is a general principle that a parent corporation is not liable for acts of its subsidiaries). In fact, one court recently dismissed a Section 10(b) claim against Bank of America Corporation, the very entity named as a defendant in this action, based upon the alleged misstatements of its subsidiary Banc of America Securities LLC. *Abbell Credit Corp. v. Bank of America Corp.*, No. 01 C 2227, 2002 WL 335320, at *4 (N.D. Ill. Mar. 1, 2002). Following the same logic as the Supreme Court in *Best Foods*, the Court in *Abbell* held that although Bank of America Corporation may have the power to control its subsidiary, it did not have a duty to do so and was not liable for the conduct and omissions of Banc of America Securities.

The corporate structure of Bank of America Corporation and its subsidiaries cannot be disregarded to hold Bank of America Corporation liable for the alleged conduct of its subsidiaries simply because Plaintiffs characterize the subsidiaries as "controlled." Cplt. ¶ 104. The claims in the Complaint, which are alleged solely against Bank of America Corporation, should therefore be dismissed.

II. PLAINTIFFS FAIL TO PLEAD A SECTION 10(b) CLAIM AGAINST BANK OF AMERICA

A. Plaintiffs' Claims Against Bank of America Based on Alleged Misrepresentations or Omissions Fail For Lack of Particularity

Plaintiffs' claims against Bank of America rest on conclusory allegations that are obviously deficient under the strict pleading standards governing federal securities claims imposed by Rule 9(b) and the Reform Act. First, Plaintiffs' claim based on alleged misrepresentations by Bank of America in Enron Registration Statements is not pled with the required specificity. Second, Plaintiffs' allegations concerning a "scheme to defraud" are not actionable and fail for lack of particularity. Third, Plaintiffs' allegations regarding alleged misstatements in analyst reports regarding Enron do not satisfy the pleading requirements of either Rule 9(b) or the Reform Act.

1. Plaintiffs' Section 10(b) Claim Is Subject To The Stringent Pleading Requirements of Rule 9(b) and the Reform Act

Rule 9(b) requires that in "all averments of fraud or mistake, circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Generalized and conclusory allegations are insufficient. *Tuchman*, 14 F.3d at 1067. Rather, Plaintiffs alleging fraud must set forth "the specific time, place, and contents of the false representations, along with the identity of the person making the misrepresentations and what the person obtained thereby." *Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994) (*citing Shusany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993)). Plaintiffs must also provide an "explanation as to why the statement or omission complained of was false or misleading." *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997); *see also Thornton v. Micrografx, Inc.*, 878 F.Supp.931, 934 (N.D. Tex. 1995) (same). In addition, a complaint must set forth specific facts establishing scienter. *Tuchman*, 14 F.3d at 1068.

Rule 9(b)'s heightened pleading requirements serve a number of important purposes: defendants are provided fair notice of their alleged fraudulent acts, courts are spared the burden of meritless strike suits, defendants' goodwill and reputations are protected and plaintiffs are prevented from filing frivolous claims with the aim of attempting to expose unknown misconduct through discovery. *See Melder*, 27 F.3d at 1097. These concerns are heightened where the purported claims are against third-party advisers such as Bank of America. *See, e.g., Devaney v. Chester*, 813 F.2d 566, 568 (2nd Cir. 1987); *Johnston v. Norton*, No. 92 Civ. 6844, 1993 WL 465333, at *20 (S.D.N.Y. Nov. 10, 1993) ("[w]here third party advisers are concerned, the complaint must allege circumstances allowing a strong inference of *knowledge* of liability") (emphasis added).

Congress passed the Reform Act in 1995 and raised the pleading bar for alleging securities fraud to weed out meritless securities actions at the earliest possible stage.[7] A

[7] *See Joint Explanatory Statement of the Committee of Conference,* H.R. Conf. Rep. No.104-369, 104th Cong., 1st Sess. 31 (1995) at 16, 31.

complaint must "specify each statement alleged to have been misleading [and] the *reason* or reasons *why* the statement is misleading...." 15 U.S.C. § 78u-4(b)(1) (emphasis added).[8] In addition, a plaintiff must set forth an explanation as to how the disputed statement was false or misleading *when made,*[9] and cannot simply "seize upon disclosures in later reports and allege that they should have been made in earlier ones."[10] A complaint that fails to meet these requirements must be dismissed. 15 U.S.C. § 78u-4(b)(3). The allegations in this case against Bank of America fall short of even the less stringent pre-Reform Act standards.

2. Plaintiffs Fail to Plead With Particularity Any Alleged Misstatement by Bank of America In Any Registration Statement

Plaintiffs' Section 10(b) claim against Bank of America appears to be based in part on alleged misstatements contained in Registration Statements issued in connection with the following securities offerings that are also the basis of their Section 11 claim: 1) a May 19, 1999 offering of 7.375% Notes; 2) an August 10, 1999 offering of 7% Exchangeable Notes; and 3) a May 18, 2000 offering of 8.375% Notes and June 1, 2000 offering of 7.875% Notes. Cplt. ¶¶ 612-613, 781; *see* ¶ 1006. Their allegations fail to meet Rule 9(b)'s requirements that the Complaint specifically identify the persons responsible for each misstatement, set forth the contents of the alleged misstatements, and provide an explanation of why each statement was misleading and how defendants knew it was misleading. *See Melder*, 27 F.3d at 1100; *Williams*,

---

[8] *See Lemmer*, 2001 WL 1112577, at *4; *Coates v. Heartland Wireless Communications,* 55 F.Supp. 2d 628, 634 (N.D. Tex. 1999).

[9] *McNamara,* 57 F. Supp. 2d at 404 (plaintiffs can demonstrate falsity "by pointing to inconsistent contemporaneous statements or information (such as internal reports) which were made available to the defendants") (*citing In re GlenFed Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)); *see also Silicon Graphics*, 183 F.3d 970, 984-85 (9th Cir. 1999) ("in the absence of such specifics, we cannot determine whether there is any basis for alleging that the officers knew that their statements were false at the time they were made – a required element in pleading fraud").

[10] *Coates*, 55 F. Supp. 2d at 635. Even prior to the Reform Act, federal courts routinely rejected attempts to plead securities fraud by hindsight. *See Melder,* 27 F.3d at 1097 n.8 (affirming dismissal of a securities fraud action based on allegations of mismanagement by hindsight).

112 F.3d at 179; *Coates v. Heartland Wireless Communications, Inc.*, 26 F.Supp.2d 910, 915 (N.D. Tex. 1998) (observing that Rule 9(b) requires plaintiffs to describe each defendant's role in the alleged fraud"); *Zuckerman v. Foxmeyer Health Corp.*, 4 F.Supp.2d 618, 622 (N.D. Tex. 1998) (plaintiff must "attribute the misleading statements on which his claim is based to a particular defendant").[11]

Remarkably, although the 500 page Complaint is replete with details of Enron's alleged wrongdoing, Plaintiffs fail to identify a single specific misstatement by Bank of America in any of the allegedly misleading Registration Statements. Likewise, Plaintiffs fail to identify the persons responsible for any alleged misstatements and offer no particularized explanation as to why they were misleading. Instead, the Complaint merely sets forth the dates and dollar amounts of the Registration Statements (Cplt. ¶¶ 48, 49, 151, 165, 236, 776-778) and lumps this information together with recitations of dozens of other alleged events involving numerous parties, followed many paragraphs later (or earlier) by allegations purporting to demonstrate the falsity of Enron's financials (Cplt. ¶¶ 155, 214, 300, 339).

Plaintiffs' "puzzle style" pleading forces both the Court and Bank of America to try to connect each of the (unidentified) alleged misstatements from the Registration Statements with the allegations that purport to establish the reasons they were misleading. This pleading

---

[11] To the extent that Plaintiffs attempt to hold Bank of America liable under Section 10(b) for alleged misstatements in numerous other securities offerings in which it is alleged to have participated, these allegations also fail under Rule 9(b). *See, e.g.*, Cplt. ¶¶ 48, 49, 612-617, 776-778. The Complaint contains even fewer facts with respect to Bank of America's involvement with these offerings than it does for the offerings which are also the basis of the 1933 Act claim. Indeed, most of the offerings are not referenced anywhere in the Complaint apart from one-line entries in charts contained in Cplt. ¶¶ 48, 49, and 777. Moreover, four of these offerings – those alleged to have taken place in 11/97, 5/98, 12/98 and 2/99 – took place more than three years before April 8, 2002, the date Bank of America was first named in this lawsuit. Any claims based on these transactions are thus time-barred and must be dismissed. *See* 15 U.S.C. § 77m (establishing three year period of repose for Section 11 claims); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (Section 10(b) claims must be brought within three years of alleged violation); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. 1981) (Section 11 claims brought after three year period of repose are absolutely barred). The 2/99 offering is also not actionable for the simple reason that Bank of America did not participate in the offering, as is apparent not only from the challenged prospectus but from Plaintiffs' own allegations. *See* Cplt. ¶ 135; Appendix Exh. 4.

method violates Rule 9(b)'s requirement to plead specifically the alleged falsity of each alleged misstatement, warranting dismissal of the Complaint on that basis alone. *See Williams*, 112 F.3d at 179 (dismissing claim on 9(b) grounds due to plaintiffs' "lack of specificity as to which portion [of the challenged prospectus] is false and why"); *Schiller v. Physicians Res. Group, Inc.*, No. Civ. A. 3:97-CV-3158L, 2002 WL 318441, at *5 n. 3 (N.D. Tex. Feb. 26, 2002) (Rule 9(b) not satisfied where plaintiffs failed to match allegedly false statements or omissions with specific facts explaining how each statement is misleading); *Wenger v. Lumisys, Inc.*, 2 F. Supp.2d 1231, 1243 (N.D. Cal. 1998) (dismissing "puzzle-style" complaint listing fourteen pages of statements followed by list of reasons all statements were false).

Rather than provide specific facts regarding alleged misrepresentations in the Registration Statements and Bank of America's responsibility for them, Plaintiffs allege in conclusory fashion that the Registration Statements incorporated "Enron's admittedly false financial statements for 97-00" and "made false and misleading statements about Enron's financial-risk management and credit risk." This is patently insufficient under Rule 9(b). Plaintiffs allege *no facts* whatsoever that link Bank of America with the alleged false statements – indeed, Bank of America is not mentioned once in the 12-page, 30-paragraph section of the Complaint entitled, "*Enron's* False and Misleading Statements in *its* 10-Ks and Registration Statements." Cplt. ¶¶ 612-41 (emphasis added).

Plaintiffs also fail to provide any facts regarding Bank of America's role in the challenged offerings, leaving it and the Court in the dark as to its alleged involvement in the preparation of the Registration Statements, the portions (if any) it drafted, its knowledge of the alleged misstatements (if any) and how and when it acquired this knowledge (if ever).[12] Instead,

[12] The Complaint implicitly acknowledges that Bank of America played no role in the preparation of the challenged Registration Statements and that none of the allegedly misleading statements contained therein can be attributed to it. In contrast to the allegations that the individual defendants "issued, caused to be issued and participated in the issuance of materially false and misleading written statements...contained in the Registration Statements" or "prepared, reviewed and/or signed the Registration Statements and Prospectuses" (Cplt. ¶¶ 1010, 1011) the Complaint contains no such allegations against Bank of America. Cplt. ¶¶ 1013-16. The absence of any representations in the Registration Statements attributable to Bank of America

Plaintiffs simply allege that *unnamed* banks knew about Enron's allegedly fraudulent practices by virtue of their business relationship to Enron. *See, e.g.*, Cplt. ¶ 617 ("the banks who sold Enron's securities to the public via those Offering Documents were in a unique position to know that the statements made concerning Enron's financial risk management and credit risk ... were false and misleading"); ¶ 619 ("the bankers and Vinson & Elkins knew the undisclosed facts – they were the ones that created the transactions containing the triggers").[13]

Such generalized allegations, based solely on guilt-by-association, make no attempt to differentiate each bank's role in each allegedly misleading Registration Statement and rely entirely on the banks' business relationships to Enron. Consequently, they fail to satisfy Rule 9(b). As stated by the court in *In re Stratosphere Corp. Sec. Litig.*, 1 F.Supp.2d 1096, 1122 (D.Nev. 1998), such vague generalizations are "applicable to every underwriter of securities . . . as virtually all underwriters of securities have the type of 'close connection' with a corporate defendant that Plaintiffs generally allege." *See Eickhorst*, 706 F.Supp. at 1092 (Rule 9(b) not satisfied by conclusory allegations that brokerage firm was linked to alleged misstatements by virtue of its "close association" and fiduciary relationship to issuer of challenged offering materials).

---

dooms Plaintiffs' claims. *See Zishka v. American Pad & Paper Co.*, No. 3:98-CV-0660-M, 2000 WL 1310529 (N.D. Tex. Sept. 13, 2000) (dismissing Section 10(b) claim against underwriters when plaintiff failed to provide facts showing they participated in the making of false statements in registration statement); *Eickhorst v. American Completion & Dev. Corp.*, 706 F.Supp. 1087, 1092 (S.D.N.Y. 1989) (dismissing claim on Rule 9(b) grounds where plaintiff made no allegation that defendant broker had any involvement in preparation or drafting of challenged offering materials).

[13] To the extent that Plaintiffs allege Section 10(b) liability based on Bank of America's mere participation as an underwriter in certain securities offerings (Cplt. ¶¶ 776-78, 780, 786), this is simply incorrect as a matter of law. *See, Abbell*, 2002 WL 335320, at *5 (Bank of America's position as lead underwriter insufficient to establish Section 10(b) liability); *Sloane Overseas Fund Ltd. v. Sapiens Int'l Corp. N.V.*, 941 F.Supp. 1369, 1377 (S.D.N.Y. 1996) (defendant's status as lead manager and underwriter of public offering insufficient to allege liability under Section 10(b)).

3. Plaintiffs Plead No Particularized Facts Regarding Bank of America's Alleged Involvement In A Scheme To Defraud

Plaintiffs also seek to impose Section 10(b) liability on Bank of America based on its supposed participation in Enron's allegedly fraudulent course of conduct. The Complaint alleges that Bank of America "participated in loans of over $4 billion to Enron during the Class Period," "helped it raise over $2 billion from the investing public," "helped it structure and finance certain of the illicit SPEs and partnerships Enron controlled" and "engaged in transactions with Enron to disguise loans to Enron and help Enron falsify its true financial condition, liquidity and creditworthiness." Cplt. ¶ 774; *see also* ¶ 779. These allegations are nothing more than thinly disguised aiding and abetting or conspiracy claims, and therefore are not actionable under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); *see also Lemmer*, 2001 WL 1112577, at *7-9 (dismissing § 10(b) claim based on unsupported "scheme to defraud" allegations); *Advanced Laser Prods., Inc. v. Signature Stock Transfer, Inc.*, No. Civ. A.3:98-CV-1624-D, 1999 WL 222385, at *2 n. 2 (N.D. Tex. Apr. 12, 1999) (dismissing as aiding and abetting claims plaintiff's allegations that brokerage firm "acted in complicity" with corporate officer in theft of securities).[14]

Even if such "scheme" allegations were actionable (which they are not), they cannot support Plaintiffs' Section 10(b) claim for the simple reason that the Complaint contains *no facts* showing Bank of America's participation in the alleged scheme. Instead, Plaintiffs rely almost exclusively on generalized allegations against "the banks and bankers" as an undifferentiated group, without any attempt to set forth facts specific to each bank. *See, e.g.*, Cplt. ¶¶ 21, 25, 31, 35, 53, 70, 616, 617, 619, 621, 646-51. Often, Plaintiffs do not provide even that degree of specificity, relying on allegations against "defendants" collectively. *See, e.g.*, Cplt. ¶¶ 418, 433. Such blanket allegations which lump together dissimilar defendants are impermissible under Rule 9(b), which requires that "[w]here multiple defendants must respond

[14] *See infra* Point II.C., demonstrating that Plaintiffs' numerous "scheme" allegations are merely disguised aiding and abetting claims that are not actionable under the federal securities laws.

to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."[15] *Thornton*, 878 F.Supp. at 938; *see also Zishka*, 2000 WL 1310529, at *1 (holding that allegations which were "undifferentiated as to the various defendants" were insufficient to satisfy Rule 9(b)); *In re Sec. Litig. BMC Software, Inc.*, 183 F.Supp.2d 860, 885-886 (S.D. Tex. 2001) (plaintiffs may not rely on allegations against defendants collectively but instead "must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned"); *McNamara*, 57 F.Supp.2d at 427-28 (Rule 9(b) not satisfied where plaintiffs failed to attribute fraud to defendants individually).

Once the improperly generalized allegations are discarded, it is readily apparent that Plaintiffs offer *no facts* showing that Bank of America participated in any fraudulent scheme. For example, although Plaintiffs allege that Bank of America "was one of the principal commercial lending banks to Enron" (Cplt. ¶ 779), was involved in "over $4 billion in loans and credit facilities to Enron or Enron-related entities" (*id.*), and "engaged and participated in a scheme to defraud...by rendering all of the above services to Enron" (Cplt. ¶ 104), nowhere in the 500 page complaint, apart from the one-line entries in paragraph 779, is there a single fact concerning the alleged loans.

Plaintiffs offer *no facts* showing Bank of America's degree of involvement in these loans and credit facilities, *no facts* showing how the alleged loans and credit facilities

---

[15] In the section of the Complaint entitled, "Involvement of Bank of America" (Cplt. ¶¶773-86), Plaintiffs go through the pretense of making allegations specific to Bank of America. This hollow effort merely underscores Plaintiffs' impermissible reliance on generalized allegations against the Bank Defendants as a group, as virtually all the allegations which purportedly apply to Bank of America alone are in fact essentially carbon copies of the conclusory allegations made against some or all of the other Bank Defendants. *Compare, e.g.*, ¶ 774 (alleging "extensive" relationships between Bank of America and Enron, and further alleging Bank of America's involvement in Enron's "fraudulent scheme") with ¶¶ 653, 675, 694, 716, 736, 751, 763 and 788 (making identical allegations against every other defendant bank); ¶ 780 (alleging that Bank of America engaged in the alleged "fraudulent scheme" because "such participation created enormous profit" in the form of interest payments, syndication fees and investment banking fees) *with* ¶¶ 660, 683, 702, 722, 744, 755 and 794 (making identical allegations against every other defendant bank).

contributed to or in any way furthered Enron's alleged fraudulent scheme, *no facts* indicating that Bank of America had knowledge of the allegedly fraudulent scheme, and *no facts* showing any fraudulent intent by Bank of America in extending these loans and credit facilities.[16] Nor do Plaintiffs allege any facts showing the extent to which Enron took advantage of the alleged credit facilities. Perhaps most glaringly, Plaintiffs offer no explanation for why Bank of America would loan millions of dollars of its own capital to an enterprise which it allegedly knew was nothing more than a "Ponzi scheme."[17]

Plaintiffs also allege that Bank of America "furthered the fraudulent scheme" by "helping to finance or otherwise participate in illicit transactions with Enron which it knew would contribute materially to Enron's ability to continue to falsify its financial condition." Cplt. ¶ 783. The Complaint further alleges that Bank of America "actively participated in the Enron fraudulent scheme by helping it structure and finance the critical LJM2 SPE." Cplt. ¶ 785. These conclusory allegations are *not substantiated by a single fact*. Plaintiffs fail to identify a single "illicit transaction" which Bank of America was involved in with Enron, fail to set forth Bank of America's alleged responsibility for the allegedly "illicit transactions," and offer no explanation as to how any such "illicit transactions" furthered the alleged fraudulent scheme.

Similarly, although allegations concerning LJM2 are found throughout the Complaint, especially in ¶¶ 19-36, 418-532 ("Enron's False Financial Statements") and ¶¶ 642-52 ("Involvement of the Banks"), Plaintiffs offer *no facts* showing that Bank of America "helped" Enron structure, or was in any manner involved with, the formation of the LJM2 SPEs. Indeed, Bank of America is not even mentioned in any of the paragraphs discussing the

---

[16] Plaintiffs' allegation that Bank of America had a motive to engage in fraud based on its receipt of "huge fees and interest payments for those loans and syndication services" (Cplt. ¶ 780) is insufficient as a matter of law to plead scienter. "Accepting plaintiffs' allegation of motive as sufficient would make a mockery of Rule 9(b) by effectively eliminating the scienter requirement as to securities underwriters since all underwriters are, of course, fee seekers." *Melder*, 27 F.3d at 1104. *See also infra* Point II.B.2.a.

[17] Moreover, at least one of the alleged transactions – the $1 billion credit facility dated 9/98 – is time-barred. *See supra* n.11.

structuring and creation of LJM2 entities. *See* Cplt. ¶¶ 23-26, 448-49, 460-62, 646-47. Plaintiffs offer *no facts at all* showing even a tenuous connection between Bank of America and any of the numerous allegations of financial fraud throughout the Complaint. Accordingly, the conclusory allegations regarding all of these matters must be rejected, and Plaintiffs' "scheme" allegations as to Bank of America should be dismissed. *See Tuchman,* 14 F.3d at 1067 ("[w]e will not accept as true conclusory allegations or unwarranted deductions of fact").

4. Plaintiffs Fail to Plead Misstatements in Analyst Reports In Conformity With Rule 9(b) and the Reform Act

Plaintiffs seek to hold Bank of America liable under Section 10(b) for allegedly false and misleading statements in analyst reports issued during the purported class period. *See* Cplt. ¶ 782.[18] The Complaint must plead alleged misstatements in analyst reports in conformity with the stringent particularity requirements of Rule 9(b) and the Reform Act. *In re Azurix Corp. Sec. Litig.,* No. H-00-4034, 2002 WL 562819, at *17 (S.D. Tex. Mar. 21, 2002). Under the Reform Act, a plaintiff must "specify each statement alleged to have been misleading, and the reason or reasons why the statement is misleading...." 15 U.S.C. § 78u-4(b)(1); *see also In re Baker Hughes Sec. Litig.*, 136 F.Supp.2d 630, 632 (S.D. Tex. 2001). The Reform Act also requires a plaintiff to plead facts showing that the alleged misstatement was false when made. *Azurix*, 2002 WL 562819, at *13, 14; *Thornton*, 878 F.Supp. at 935. A complaint that fails to conform with these requirements must be dismissed. 15 U.S.C. § 78u-4(b)(3)(A).

Here, Plaintiffs fail to satisfy the particularity requirements of Rule 9(b) and the Reform Act. Although Plaintiffs quote liberally from analyst reports throughout their Complaint, they fail to identify which passages are purportedly false and misleading. *See, e.g.*, Cplt. ¶¶ 173, 182, 185, 195, 233, 258. Nor does the Complaint offer any facts demonstrating why the statements in the reports are misleading, or why they were false when made. Absent such facts,

[18] Because analyst reports are after-market statements, no liability may attach to such reports under Section 11 of the 1933 Act, which concerns only registration statements. *See Rhodes v. Omega Research, Inc.*, 38 F.Supp.2d 1353, 1360 n.8 (S.D. Fla. 1999).

Plaintiffs' Section 10(b) claim based on analyst reports must be dismissed. *See Thornton*, 878 F.Supp. at 935.

B. Plaintiffs Fail To Plead Facts Giving Rise To A Strong Inference Of Scienter

1. The Reform Act Raised The Standard For Pleading Scienter Beyond That Required By Rule 9(b)

Plaintiffs must also plead scienter with particularity to sustain a Section 10(b) claim under both Rule 9(b) and the Reform Act. The Reform Act requires, with respect to each alleged misstatement or omission, that a plaintiff "*state with particularity facts giving rise to a strong inference* that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407 (5th Cir. 2001); *In re Paracelsus Corp. Sec. Litig.*, 61 F. Supp.2d 591, 595 (S.D. Tex. 1998). With respect to non-forward looking statements (e.g., purely historical statements of past performance), a plaintiff must plead facts demonstrating severe recklessness. *See In re Azurix Corp. Sec. Litig.*, 2002 WL 562819, at *21 (citing *Nathenson*, 267 F.3d at 408). "What must be alleged is not motive and opportunity as such but *particularized facts* giving rise to a strong inference of scienter." *Nathenson*, 267 F.3d at 412 (emphasis added). Where, as here, the allegations pertain to "third-party advisers, such as underwriters or accountants, plaintiffs' [scienter] allegations must be commensurably stronger, approximating an actual intent to aid in the fraud being perpetrated by the company." *In re Indep. Energy Holdings. PLC Sec. Litig.*, 154 F.Supp.2d 741, 764 (S.D.N.Y. 2001); *see also In re WRT Energy*, Nos. 96 CIV. 3610, 3611 (JFK), 1999 WL 178749, at *9 (S.D.N.Y. Mar. 31, 1999).

Similarly, with respect to forward-looking statements (such as earnings per share and growth projections in analyst reports), Plaintiffs must plead *particularized facts* demonstrating that the forward looking statement was made with "*actual knowledge*" that the statement was false or misleading. 15 U.S.C. § 78u-5(c)(1)(B); *Nathenson*, 267 F.3d at 409.

To survive a motion to dismiss, a complaint must state particularized facts that raise a strong inference that each defendant acted intentionally or with severe recklessness in

making false or misleading statements to investors. *Nathenson*, 267 F.3d at 408.[19] Mere allegations of motive and opportunity alone are insufficient. *Id.* at 412; *see also Kurtzman v. Compaq Computer Corp.*, Civil Action No. H-99-779, slip op. at 43 (S.D. Tex. Apr. 1, 2002) (motive and opportunity are relevant to, but generally insufficient alone to allege scienter); *In re Azurix Sec. Litig.*, 2002 WL 562819, at *21 ("[a]llegations of motive and opportunity are no longer sufficient, however, to plead a strong inference of scienter").

2. Plaintiffs Fail to Satisfy the Reform Act's Stringent Requirements for Pleading Scienter

As discussed below, the specific facts necessary to avoid the dismissal of Plaintiffs' Section 10(b) claims based on analyst reports and Registration Statements, as well as participation in securities offerings and an alleged scheme to defraud, are conspicuously absent in this case. *Nowhere* in the Complaint do Plaintiffs plead *any* facts showing that Bank of America was reckless, let alone possessed actual knowledge or an intent to defraud, or that *any* statement in *any* analyst report or *any* Registration Statement was false when made. Instead, Plaintiffs repeat a laundry list of allegedly "true but concealed facts" that includes *not a single fact* that shows Bank of America was reckless, or knew that it was publishing false and misleading information.[20] *See, e.g.*, Cplt. ¶¶ 214, 300, 339; *see also Devaney,* 813 F.3d at 568 (rejecting claims where "complaint does not allege facts to suggest who at Salomon Brothers possessed such knowledge, when and how they obtained the knowledge, or even why anyone at Salomon Brothers should have known" that documents did not express the true views of

---

[19] In *Nathenson*, the Fifth Circuit defined "severe recklessness" as follows: "'*highly unreasonable* omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either *known to he defendant or is so obvious that the defendants must have been aware of it.*'" *Nathenson*, 267 F.3d at 408 (emphasis added) (citation omitted).

[20] Plaintiffs also plead *no facts* showing that there was a breakdown in the so called "Chinese Wall" between investment banking and analysts. Cplt. ¶ 775. Indeed, the Complaint simply repeats the conclusory allegations it makes against virtually all of the other bank defendants. *Compare* Cplt. ¶ 775 with ¶¶ 654, 676, 695, 717, 737, 764 and 789.

management). Similarly, Plaintiffs' conclusory allegations that Bank of America *knew of* and *willingly assisted* Enron in falsifying its financial statements is *not supported by a single fact* alleged in the Complaint. *See,* e.g., Cplt. ¶ 773. Plaintiffs do not identify any facts, internal documentation or other contemporaneous information indicating that Bank of America did not believe its statements in analyst reports, knowingly or recklessly made misrepresentations in any Registration Statement or was aware of Enron's alleged financial shenanigans. In addition, Plaintiffs' motive theory is insufficient as a matter of law and is of the type routinely rejected because it assumes irrational behavior. In short, Plaintiffs' failure to plead facts showing a "strong inference" of scienter mandates dismissal of their Section 10(b) claims.

a. Plaintiffs' Motive and Opportunity Allegations are Insufficient as a Matter of Law

Plaintiffs' allegations that Bank of America was motivated to commit fraud in order to continue to receive underwriter and consulting fees, interest payments, commitment fees and other payments as a result of its work for Enron are patently insufficient. Cplt. ¶¶ 3, 31, 73, 394, 630, 648-49, 773, 780.[21] Courts routinely reject similar allegations. Accepting them would effectively eliminate the scienter requirement as to financial services firms and accountants, since these professionals always seek fees for their work. *See, e.g., Melder,* 27 F.3d at 1103 (dismissing claim); *Schiller,* 2002 WL 318441, at *9 (accountant's motive to generate fees does not give rise to inference of scienter); *McNamara*, 57 F. Supp. 2d at 423 (investment bank's alleged motive to collect professional fees for its advisory position insufficient to plead scienter); *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (scienter pleading requirement not met by simple allegation that accountants would receive two years of fees); *Geiger v. Solomon-*

[21] That Bank of America was motivated so its or Enron's "access to the credit market would continue" (Cplt. ¶ 780) alleges nothing more than Bank of America's alleged desire to continue collecting fees from Enron.

Page Group, Ltd., 933 F. Supp. 1180, 1190 (S.D.N.Y. 1996) (alleged motive to earn underwriting commission insufficient to sustain scienter).[22]

Plaintiffs' attempts to allege motive based upon Bank of America's alleged participation in various transactions or offerings (*see, e.g.*, Cplt. ¶¶ 29, 773, 780, 785) fail to sufficiently allege concrete benefits and personal profits obtained as a result of the fraud. *See, e.g., Melder*, 27 F.3d at 1102 (motive allegations insufficient absent allegation that any defendant "actually personally profited"); *Schiller*, 2002 WL 318441, at *8 (rejecting motive allegations that did not sufficiently allege self-interested conduct to obtain concrete benefits). The generalized, vague allegations that Bank of America profited from its alleged investment in the LJM2 partnership (Cplt. ¶¶ 773, 785) fail to "aver with particularity" the concrete benefits obtained. *See Coates*, 55 F. Supp. 2d at 642.[23]

Plaintiffs similarly fail to allege with sufficient particularity that Bank of America was motivated by Enron's repayment of debt to Bank of America. Cplt. ¶ 780. Although the Complaint sets forth loans made to Enron, it fails to identify which loans were outstanding at the time of the alleged misstatements and omissions, what proceeds from what offerings were used,

---

[22] In fact, several courts have stated that inferring fraudulent intent from such "motives" on the part of professionals, who share in relatively little gain from the alleged fraud but are exposed to potentially enormous liability, is irrational. *See, e.g., Melder*, 27 F.3d at 1104 n.10 (allegation that underwriters would risk reputation presents "an inference of irrationality we refuse to indulge"); *In re WRT Energy*, Nos. 96 CIV. 3610 & 96 CIV. 3611, 1997 WL 576023, at *12 (S.D.N.Y. Sep. 15, 1997) (noting that it would not be in the underwriters' financial interest to risk their reputations simply to generate fees amounting to a small percentage of their annual revenues).

[23] Unsupported assertions that the defendants as a group were enriched (Cplt. ¶¶ 23, 811, 874, 815), that the banks received unspecified payouts from the Raptor SPE's and were "economic beneficiaries," (Cplt. ¶¶ 31, 649), and that the LJM2 investment was a reward for participating in the fraud (Cplt. ¶¶ 646, 773, 785) fail to allege with sufficient particularity that Bank of America personally profited or obtained any concrete benefit. Moreover, Plaintiffs' allegations that the deal *promised* or *guaranteed* large returns in the future (Cplt. ¶¶ 25, 31, 73, 646, 649, 785, 813, 880) does not allege whether any such returns materialized and thus fail to identify *any* concrete benefit actually obtained by Bank of America or any of the banker defendants, let alone with the required degree of specificity.

which debt was repaid, when and in what amount.[24] Plaintiffs' motive theory requires that the Court believe that Bank of America acted irrationally. Plaintiffs allege that Bank of America knew of the alleged misconduct and that Enron was in a precarious position during the class period, yet continued to put its money at risk during that very time, loaning money to Enron and investing in one of the partnerships at issue. Cplt. ¶ 779.[25] Courts within this Circuit routinely refuse to accept such irrational or illogical theories of motive. *See Thornton*, 878 F. Supp. at 938 (the Court "refuse[d] to leave its common sense at the courthouse steps," concluding that a nonsensical premise of motive did not adequately plead scienter); *Coates*, 55 F. Supp. 2d at 643 (rejecting motive theory that "defies common sense").[26] Courts in other circuits also reject implausible motive allegations. *See, e.g., Kalnit v. Eichler,* 264 F.3d 131, 140-141 (2d Cir. 2001) ("Where 'plaintiff's view of the facts defies economic reason,...[it] does not yield a reasonable inference of fraudulent intent'") (citation omitted); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) ("Plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible"). Accordingly, this Court should reject Plaintiffs' flawed motive theory.

---

[24] *See e.g., Mortensen v. Americredit Corp.*, 123 F.Supp.2d 1018, 1023 (N.D. Tex.) *aff'd*, 240 F.3d 1073 (5th Cir. 2000) (allegations of motive based on desire to obtain debt on favorable terms and manipulate loan rates which failed to identify improperly treated loans too generalized and vague to establish scienter); *Glickman v. Alexander & Alexander Servs., Inc.*, No. 93 Civ. 7594 (LAP), 1996 WL 88570, at *7 (S.D.N.Y. Feb. 29, 1996) (generalized unsubstantiated motive to induce lenders to extend credit failed absent any examples of credit being extended).

[25] The unsupported assertion that Bank of America was "limiting its own risk" (Cplt. ¶ 780) is belied by the very facts alleged in the Complaint.

[26] The allegation that Bank of America was motivated so that Enron could maintain its credit rating and thereby continue the fraudulent scheme is circular and does not allege a motive theory separate from those addressed above. Cplt. ¶¶ 780,782.

b. Plaintiffs' Allegations Do Not Support A Strong Inference of Conscious Misbehavior or Severe Recklessness

Although the words "*knowing*," "*knew*" and "*aware*" are repeatedly used throughout the Complaint to describe Defendants' conduct, Plaintiffs allege *no facts*, let alone particularized facts, constituting strong circumstantial evidence that Bank of America acted with the requisite scienter.[27]

Plaintiffs assert in conclusory fashion that Bank of America interacted with top Enron executives on an almost daily basis, discussing Enron's business, financial condition, financial plans, financial needs, partnerships, SPEs and future prospects, and that Bank of America had access to Enron's internal business and financial information as its *lead* lending bank.[28] Cplt. ¶¶ 774, 784. Courts routinely reject allegations, such as those made here, that seek to impute knowledge to a defendant based merely upon interaction with a company and access to its internal information. *See In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, Civil Action No. H-99-1948, slip op. at 66 (S.D. Tex. Feb. 19, 2001) (dismissing Section 10(b) claim based on allegation that underwriters had access to confidential corporate information and communicated frequently with officers and directors of issuer where plaintiffs failed "to identify specifically what kind of information, when it was conveyed, by whom and to whom" and "failed to identify

---

[27] Conclusory statements are not sufficient to allege state of mind under the Reform Act. *Nathenson*, 267 F.3d at 419-20; *see also Fisher v. Offerman & Co.*, No.95 Civ. 2566 (JGK), 1996 WL 563141, at *7 (S.D.N.Y. Oct. 2, 1996) (allegations that underwriter was aware of company's precarious liquidity position were conclusory and speculative and failed to show that underwriter knew that any statements in the prospectus were false and misleading). Rather, Plaintiffs must allege facts in support of defendants' state of mind *at the time* the alleged statements or omissions were made. *In re Azurix*, 2002 WL 562819, at *13 (dismissing claims that failed to allege facts demonstrating defendants knew or should have known statements were false or misleading when they were made); *Lemmer*, 2001 WL 1112577, at *11 (plaintiff failed to plead scienter with facts "indicating that at the time the allegedly false statements were made, defendants had actual knowledge of contradictory facts").

[28] Once again, Plaintiffs repeat the same allegation with respect to every bank defendant. Thus, while the section of the Complaint on Bank of America asserts that Bank of America was Enron's "lead" lending bank, Plaintiffs make that same claim with respect to the other banks. *See* Cplt. ¶¶ 713 (CSFB); 733 (CIBC); 760 (Barclays); 771 (Lehman); 793 (Deutsche Bank and Citigroup). These tactics highlight Plaintiffs' inability to meet their pleading requirements.

any specific information communicated by document or conversations to the Underwriter Defendants or uncovered by them in their due diligence investigation"); *Schiller*, 2002 WL 318441, at *10 (failure to identify type of information to which defendants had access, contents of unnamed documents, or which defendants possessed information failed to plead scienter); *In re Baker Hughes Sec. Litig.*, 136 F. Supp. 2d at 648 (generalized allegations of intimate familiarity with company's operations, access to non-public information and receipt of financial reports fail to raise a strong inference of scienter); *Compaq*, slip op. at 46 (plaintiffs failed to allege with specificity the actual contents of reports received and meetings attended or any link between the reports and meetings and defendants); *Wenger*, 2 F. Supp.2d at 1251-1252 (scienter based upon "routine components of underwriting services" would "effectively eliminate the scienter requirement as to securities underwriters"). Plaintiffs fail to allege any facts suggesting who at Bank of America possessed knowledge of Enron's actual financial situation and off-balance sheet partnerships and transactions, when and how they obtained the knowledge, or why they should have known the information did not represent the true beliefs of Enron management. *Devaney*, 813 F. 2d at 568.[29]

As to their assertion that Bank of America issued false and misleading analyst reports throughout the class period (Cplt. ¶ 782), Plaintiffs do not point to *any* internal documents or other contemporaneous information indicating that Bank of America did not believe its projections about Enron's future performance or reports of Enron's past performance. Their failure to do so requires dismissal of the Section 10(b) claims based on Bank of America's analyst reports. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1410 (9th Cir. 1996) (affirming dismissal of claims based on analyst reports because "[plaintiff] provides no specific facts - no names, no meetings, no internal memoranda or documents, no specific conduct or statement - in

[29] Plaintiffs' attempt to impute to Bank of America's securities analysts the knowledge obtained by Bank of America while rendering banking services to Enron (Cplt. ¶ 775) fails to establish scienter, since the Complaint does not allege a single fact actually learned in the course of rendering those banking services.

support of its theory"); *In re Oak Tech. Sec. Litig.*, No. 96-20552 SW, 1997 WL 448168 (N.D. Cal. Aug. 1, 1997) (dismissing claims against underwriter where plaintiffs did not cite specific documents or other contemporaneous facts indicating that underwriter did not believe the projections in its analyst reports).

Plaintiffs also attempt to create an inference of scienter by reference to a number of particular transactions in which Bank of America allegedly played a role.[30] However, the mere allegation that Bank of America was an underwriter for various Enron offerings and participated in loans to Enron (Cplt. ¶¶ 774, 776-79) fails to demonstrate what Bank of America knew, or how and when it obtained such knowledge in connection with the offerings and loans.[31] Importantly, *no facts* are alleged about Bank of America's knowledge at the time of the offerings or the loan transactions (or at any time thereafter) that the Enron financial statements were false or that Bank of America knew yet concealed material information about Enron's allegedly improper financial dealings.[32]

---

[30] This includes the allegation that Bank of America was a lead underwriter in the Azurix IPO and that it loaned money to Enron to finance the Dabhol power plant. Cplt. ¶¶ 590, 778, 779. Although the Complaint alleges extensive fraudulent conduct *by Enron* in relation to Azurix (Cplt. ¶¶ 20, 83(gg), 117, 121(h), 136, 139, 152, 155(n), 364, 368, 388, 590-93), and Dabhol (Cplt. ¶¶ 112, 121(f), 137, 155(h), 155(k), 214(m), 216, 279, 305, 314, 330, 342, 581, 598-602, 614, 897), it does not contain a single fact suggesting any involvement of Bank of America in the fraud, or any conduct by Bank of America relating to the IPO or the loan that would give rise to Bank of America's knowledge or reckless disregard with respect to Azurix or Dabhol.

[31] The mere fact that Bank of America was an underwriter in the offering or a lender is not sufficient to establish its scienter. *Zishka*, 2000 WL 1310529, at *3 (dismissing claims against underwriters of IPO where the complaint lacked allegations that they participated in the making of statements they knew or should have known to be false; plaintiffs must allege what defendants knew, who knew it and when they learned it); *Jett v. Sundermen*, 840 F.2d 1487, 1493 (9th Cir. 1988) (bank not liable under 10(b) based on participation in routine financing); *Interallianz Bank AG v. NYCal Corp.*, No. 93 Civ. 5024 (RPP), 1994 WL 177745, at *6 n.7 (S.D.N.Y. May 6, 1994) (dismissing Section 10(b) claim insufficient due to failure to allege any role in transaction beyond normal conduct of lender).

[32] Plaintiffs' allegation that the banks were in "a unique position to know" that statements in the offering documents were false and misleading (Cplt. ¶ 617) fails to allege with particularity any specific conduct or role that would put Bank of America in a unique position or any facts to support the necessary state of mind. Moreover, allegations that defendants "must have known" information based solely on their position as underwriters or lenders fail to

Specifically, Plaintiffs fail to set forth any facts showing that Bank of America knowingly or recklessly made misrepresentations in any Registration Statement, had actual knowledge of the falsity of any representation made in a Registration Statement, or had any motive to engage in securities fraud. Plaintiffs' scienter theory relies entirely on conclusory allegations that Bank of America must have known of Enron's alleged fraud by virtue of its business relationship to Enron. These allegations are insufficient as a matter of law. *See, e.g., Collmer v. U.S. Liquids, Inc.*, No. H-99-2785 2001 U.S. DIST. LEXIS 23518, at *91-102 (S.D. Tex. Jan. 23, 2001) (dismissing Section 10(b) claim based on alleged misrepresentations in registration statement when plaintiffs failed to plead facts showing that defendants knew or should have known of alleged misconduct); *Azurix*, 2002 WL 562819, at *13-14 (plaintiffs failed to plead scienter with respect to alleged misstatements in registration statement when complaint set forth no facts "demonstrating that defendants knew or reasonably should have known that these statements were false and/or misleading when made").

Similarly, Plaintiffs' allegation that Bank of America invested $45 million in the LJM2 partnership and, with the other banks, helped to structure and finance the partnership (Cplt. ¶¶ 29, 773, 785), fail to establish the requisite state of mind on the part of Bank of America.[33] The Complaint does not allege *any* conduct on the part of Bank of America relating to structuring or financing the partnership that would give rise to knowledge of the alleged fraud.

---

adequately plead scienter. *See supra* at p. 27 n.31; *Lemmer*, 2001 WL 1112577, at *9 (allegations of position and access to non-public information insufficient to satisfy Reform Act).

[33] In many places, the Complaint merely alleges that the banks in general, without identifying specific actors, helped create, structure and finance the LJM partnerships. (Cplt. ¶¶ 23, 35, 70(c), 305, 617, 621, 881). Moreover, general allegations that Bank of America helped to structure and finance "certain illicit partnerships or SPEs", and engaged in transactions with Enron to disguise loans to Enron and help Enron falsify its true financial condition (Cplt. ¶¶ 773-74), without identifying specific partnerships or transactions, fail to plead the circumstances of fraud with sufficient particularity. *See supra* at p. 18. In several instances the Complaint identifies particular entities involved in the creation, structuring and financing of the partnerships, and Bank of America is specifically *not* included. Cplt. ¶¶ 26, 460-61, 498, 647-48, 883. Such generalized allegations are also insufficient to give rise to an inference of scienter, absent details as to what Bank of America knew, when it knew it and how it gained the knowledge. *See supra* at pp. 21-22.

In particular, Plaintiffs' generalized assertions of the banks' knowledge (Cplt. ¶¶ 70, 305, 393, 651) do not set forth what Bank of America knew, how it was known, when it was known or why the information obtained made the statements false or misleading with respect to the LJM2 partnership or any other transactions in which Bank of America allegedly participated. In short, none of Plaintiffs' allegations regarding transactions in which Bank of America purportedly participated gives rise to an inference of scienter.[34]

C. Plaintiffs' Section 10(b) Claims Against Bank Of America Should Be Dismissed Because They Are Nothing More Than Aiding And Abetting Claims Barred Under Central Bank

1. Plaintiffs' "Scheme" Allegations are Not Actionable Under Section 10(b)

In *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), the Supreme Court eliminated aiding and abetting as a private cause of action under Section 10(b). The Fifth Circuit, following the mandate of *Central Bank*, has likewise held that aiding and abetting claims are no longer actionable under Section 10(b). *Melder*, 27 F.3d at 1104, n.9. The Complaint in this case is rife with claims that Bank of America actively engaged in a "fraudulent scheme" and "conspiracy" to assist Enron structure and finance illegal partnerships, falsify its financial statements, and defraud the market by raising billions of dollars to help finance and structure an

---

[34] Plaintiffs' suggestion that the banks failed to conduct a reasonable investigation or independent verification that would presumably have uncovered the alleged fraud fails to establish scienter. Cplt. ¶ 642. It is well-settled that the speculative allegation that "a defendant's due diligence investigation 'should have turned up the asserted improprieties in the offering materials'" is an insufficient basis from which to infer fraudulent intent. *In re WRT Energy Sec. Litig.*, 1997 WL 576023, at *13 (quoting *Eickhorst*, 706 F. Supp. at 1093-94); *see also In re WRT Energy Sec. Litig.*, 1999 WL 178749, at *9 (allegations that amount to a claim that underwriters would have uncovered the truth if they had performed adequate due diligence constitute "negligence at best"). Moreover, Plaintiffs' allegation that Bank of America did not conduct proper due diligence contradicts their allegations that the banks were intimately involved and in contact with Enron and, therefore, must have known of the alleged fraudulent conduct. *See Fisher*, 1996 WL 563141, at *7 (allegation that underwriter conducted shoddy due diligence contradicted allegations that underwriter did due diligence and was in contact with bankers and therefore knew about company's financial condition).

illegal and fraudulent Ponzi scheme. *See, e.g.*, Cplt. ¶¶ 393, 773-774, 25. These are precisely the types of aiding and abetting allegations prohibited by *Central Bank* and *Melder*.[35]

In fact, Plaintiffs' "scheme" allegations are "no more than a thinly disguised attempt to avoid the impact of the *Central Bank* decision" and should be dismissed. *See In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 762 (N.D. Cal. 1997), *aff'd*, 183 F.3d 970 (9th Cir. 1999) (quoting *Stack v. Lobo*, No. Civ. 95-20049 SW, 1995 WL 241448, at *10 (N.D. Cal. April 20, 1995)). Numerous courts, including some in this Circuit, have held that such "scheme" allegations are no longer actionable after *Central Bank*. In *Zishka*, 2000 WL 1310529, at *4, for example, the court dismissed plaintiffs' claims against a lender and underwriters because the allegations "sound[ed] to the Court like aiding and abetting claims." S*ee also Lemmer*, 2001 WL 1112577, at *7-8 (rejecting generalized "scheme to defraud" allegations in light of *Central Bank*); *Strassman v. Fresh Choice, Inc.*, No. C-95-20017 RPA, 1995 WL 743728, at *17 (N.D. Cal. Dec. 7, 1995) (dismissing "scheme to defraud" claims against underwriters for alleged misrepresentations both within and outside prospectuses under *Central Bank*); *In re Oak Tech. Sec. Litig.*, 1997 WL 448168, at *10 (dismissing "scheme to defraud" allegations). Similarly, in *In re Valence Tech. Sec. Litig.*, No. C95-20459 JW, 1996 WL 37788, at *10-11 (N.D. Cal. Jan. 23, 1996), the court determined that allegations that an underwriter participated in a "scheme to defraud" by agreeing to act as the issuer's lead underwriter, allegedly issuing favorable reports that helped maintain the market price of the stock, and

---

[35] *See, e.g.*, Cplt. ¶ 783 ("*In addition to its own direct liability* ... Bank of America also engaged and participated in and furthered the fraudulent scheme by helping to finance or otherwise participate in illicit transactions with Enron ....") (emphasis added); ¶ 774 ("[Bank of America] engaged in transactions with Enron to disguise loans to Enron and help Enron falsify its true financial condition, liquidity and creditworthiness"); ¶ 780 ("Bank of America was willing to engage and participate in the ongoing fraudulent scheme ...."); ¶ 785 ("Bank of America also actively participated in the Enron scheme by helping it structure and finance the critical LJM2 SPE"); *see also* similar allegations of Bank of America's alleged participation in a "scheme to defraud" in Cplt. ¶¶ 2, 17, 21, 23, 25, 31, 32, 33, 35, 70, 104, 394, 994, 995(a). The Second Circuit noted in *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) that words such as "assisting," participating in," and "complicity in," as well as similar synonyms, are all barred by *Central Bank*. Plaintiffs' assertions regarding Bank of America's "participation" are therefore insufficient as a matter of law.

agreeing to do follow-up were merely an impermissible attempt to state a cause of action for Section 10(b) aiding and abetting.[36]

2. Plaintiffs Fail to Plead a Primary Violation of Section 10(b) Against Bank of America for Alleged Misstatements in Registration Statements

Plaintiffs also allege that Bank of America is liable under Section 10(b) for participation in securities offerings and for making false and misleading statements in Registration Statements. *See, e.g.*, Cplt. ¶¶ 612-613, 773, 781-782. This claim fails in light of *Central Bank* and its progeny because Plaintiffs fail to allege a primary violation of Section 10(b) against Bank of America.[37] After *Central Bank*, courts developed two tests to determine whether a defendant is a primary or secondary violator. Bank of America cannot be held liable as a primary violator of Section 10(b) under either test.

Under the "bright line" standard, primary liability is imposed only if the actor actually makes a misstatement or omission and the misstatement or omission can be attributed directly to the actor. *See, e.g., Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001); *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996); *Vosgerichian v. Commodore Int'l*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994); *In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26 (D. Mass. 1994); *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1394 & n.18 (N.D. Ill. 1990). Only one Circuit court has adopted the "substantial participation" or "substantial role" standard, under which a secondary

---

[36] Courts have also consistently dismissed secondary liability claims based on allegations of "conspiracy" on the grounds that they are non-actionable aiding and abetting claims. *See, e.g., Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998); *In re GlenFed, Inc. Sec. Litig.*, 60 F.3d 591 (9th Cir. 1995); *Epstein v. MCA, Inc.* 54 F. 3d 1422 (9th Cir. 1995); *Sunrise Fin., Inc. v. Painwebber, Inc.*, 948 F. Supp 1002 (D. Utah 1996); *Snap-On, Inc. v. Ortiz*, No. 96-C-2138, 1996 WL 627618 (N.D. Ill. Oct. 24, 1996); *Vennittilli v. Primerica, Inc.*, 943 F. Supp. 793 (E.D. Mich. 1996); *Kidder Peabody & Co. v. Unigestion Int'l, Ltd.*, 903 F. Supp. 479 (S.D.N.Y. 1995).

[37] *See also Cogan v. Triad American Energy,* 944 F.Supp. 1325, 1337 (S.D. Tex. 1996) (liability as a primary violator requires that an actor do something more than merely assist the issuer to sell a security by furnishing a service).

actor may be held primarily liable if the actor substantially participated or played a significant role in the preparation of a misrepresentation or omission by someone else. *See McGann v. Ernst & Young*, 102 F.3d 390 (9th Cir. 1996). In the context of an allegedly misleading prospectus or registration statement, this typically means participation in drafting and editing the offering document. *See, e.g. Employers Ins. of Wausau v. Musick, Peeler, & Garrett*, 871 F. Supp. 381, 389 (S.D. Cal. 1994).

While the Fifth Circuit has yet to adopt one of the two theories, at least one court in this circuit appears to have followed the three circuit courts that have embraced the bright line test. *See Lemmer*, 2001 WL 1112577.[38] After quickly disposing of plaintiff's group pleading allegations, the *Lemmer* court dismissed the Section 10(b) claims against nine of the individual defendants based on a scheme to defraud on grounds that the plaintiff failed to allege specific misrepresentations by those defendants. *Id.* at *5, 7, 8.

The bright line test is the appropriate standard for several reasons. First, it is consistent with the language in Section 10(b) and Rule 10b-5 and with *Central Bank.* It is clear from the Supreme Court's decision in *Central Bank* that a secondary actor cannot be held liable under Section 10(b) or Rule 10b-5 unless the actor actually makes a misstatement or omission. 511 U.S. at 191 ("[a]ny person or entity, including a lawyer, accountant or bank, who employs a manipulative device *or makes a material misstatement (or omission) on which a purchaser or seller of securities relies* may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability are met." *Id.* at 191 (emphasis added)); *see Anixter*, 77 F.3d at 1226-27 ("Reading the language of Section 10(b) and rule 10b-5 through the lens of *Central Bank of Denver*, we conclude that in order for accountants to 'use or employ' a 'deception' actionable under the antifraud law, they must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors"); *Wright*, 152 F.3d at

[38] *But see, McNamara*, 57 F. Supp. 2d at 430 (holding that if all other requirements of Section 10(b) are satisfied, plaintiffs may advance their case under either of the two tests).

175 ("[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b)") (quoting *Shapiro v. Cantor*, 123 F.3d at 720).

Second, the bright line test is preferable because it provides more guidance to litigants than the substantial participation test, which was one of the concerns of the Supreme Court in *Central Bank*. *See Anixter*, 77 F.3d at 1227 (citing *Central Bank*, 511 U.S. at 189 (certainty and predictability are crucial to securities markets)). Third, the bright line test comports with the heightened pleading requirements of Rule 9(b) and the Reform Act. *See Lemmer*, 2001 WL 1112577 at *8 (plaintiff failed to satisfy the heightened pleading standards required by Rule 9(b) and the Reform Act as to nine defendants because she failed to allege specific misrepresentations by those defendants).

Fourth, the substantial participation standard improperly circumvents the reliance requirements of Section 10(b), as "[r]eliance only on representations made by others cannot itself form the basis of liability." *See Wright*, 152 F.3d at 175 (quoting *Anixter*, 77 F.3d at 1225); *see also Ziemba*, 256 F.3d at 1205 ("in light of *Central Bank*, in order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which plaintiff relied must have been publicly attributable to the defendant at the time the plaintiff's investment decision was made").

Bank of America cannot be held liable under the "bright line" test because Plaintiffs do not attribute to it any specific misstatement in any of the offering documents. Instead, Plaintiffs make conclusory allegations that Bank of America "made" the allegedly false and misleading statements in Enron's Registration Statements and prospectuses merely because Bank of America purportedly was one of the underwriters of certain offerings. *See, e.g.,* Cplt. ¶ 781. However, as the bright line cases cited above make clear, Bank of America cannot be held liable under Section 10(b) for merely serving as an underwriter in securities offerings. *See also Cogan,* 944 F.Supp. at 1337 (liability as a primary violator requires that an actor do something more than merely assist the issuer to sell a security by furnishing a service to the issuer).

Even assuming, *arguendo*, that this Court were to accept the more expansive "substantial participation" standard, Bank of America cannot be held liable for statements in the Registration Statements because Plaintiffs have failed to plead any facts demonstrating that Bank of America played a significant role in drafting or editing the allegedly false statements made by Enron in those documents. *See McNamara*, 57 F. Supp. 2d at 430 (finding that plaintiffs will have adequately stated a primary violation against defendants if plaintiffs "adequately plead facts showing that [defendants] played a significant role in developing the allegedly false statements made by [the primary actor]").

D. Statements in Analyst Reports are Not Actionable Under Section 10(b) Because Bank of America Does Not Owe a Duty to the General Marketplace

Plaintiffs allege that Bank of America is liable for allegedly false and misleading statements concerning "Enron's business, finances and financial condition and its prospects" contained in its analysts' reports. *See* Cplt. ¶ 782. However, a securities analyst is not liable to the entire marketplace for allegedly misleading analyst reports issued to its clients. *See In re Oak Tech. Sec. Litig.*, 1997 WL 448168, at *13 (finding that underwriter does not owe a duty to non-clients); *In re Valence Tech. Sec. Litig.*, 1996 WL 33788, at *9 (same). Section 10(b) jurisprudence is also clear that an underwriter's duty does not extend beyond its clients. *See Dirks v. SEC*, 463 U.S. 646, 654 (1983) (a duty to disclose under Section 10(b) arises from the existence of a fiduciary relationship); *Chiarella v. U.S.*, 445 U.S. 222, 232-33 (1980) (a duty arises from a specific relationship between two parties). Thus, to establish an underwriter's liability under Section 10(b), plaintiffs must allege that they were one of the underwriter's clients, that they read or relied upon a misstatement in an analyst report, or that any of the allegedly false and misleading reports were issued to the general public. *See In re Valence Tech. Sec. Litig.*, 1996 WL 33788, at *9 (citing such requirements).

Here, Plaintiffs do not allege that they were one of Bank of America's institutional clients, that they read or relied upon its analyst reports or that Bank of America disseminated its analyst reports directly to the general public. Nor do they allege any facts

demonstrating that the financial press or the market eventually became aware of these reports. Instead, Plaintiffs simply argue that the analysts' reports are actionable because they were all statements by Bank of America to "the securities markets." *See* Cplt. ¶ 782. As demonstrated above, this is insufficient. Accordingly, Bank of America may not be held liable to Plaintiffs – non-clients – for statements made in its analyst reports.

III. PLAINTIFFS' CLAIMS AGAINST BANK OF AMERICA BASED ON THE 8.375% NOTES OFFERING MUST BE DISMISSED BECAUSE NO PLAINTIFF PURCHASED THOSE NOTES

Plaintiffs' allegations against Bank of America under Sections 10(b) and 11 with respect to the 8.375% Notes fail because neither of the proposed representative plaintiffs for the 8.375% Notes sub-class purchased *any* of these notes at *any* time.[39] In fact, Plaintiffs have not alleged that any plaintiff purchased 8.735% Notes. Cplt. ¶¶ 79-81. Since, as shown below, there is no plaintiff who has standing to allege the claims in the Complaint stemming from the 8.375% Notes, the claims against Bank of America relating to this offering must be dismissed.

Plaintiffs' inability to allege a purchase of 8.375% Notes is fatal to their Section 10(b) claims relating to this offering, since only actual purchasers and sellers of securities have standing to pursue such claims. 15 U.S.C. § 78j(b); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 731 (1975). In *Smith v. Ayres*, 845 F.2d 1360, 1364 (5th Cir. 1988), for example, the court noted that the district court could have dismissed a Rule 10b-5 claim at the pleading stage since plaintiff "did not buy or sell anything in connection with the disputed transaction"

---

[39] The Complaint identifies the Hawaii Laborers Pension Plan and the Archdiocese of Milwaukee as the sub-class representatives for the 8.375% offering. Cplt. ¶ 1006. The certifications for these plaintiffs reflect that they purchased 7.875% Notes. As discussed below, Bank of America was ***not*** an underwriter with respect to that offering. *See infra* Point IV.B; Certification of Hawaii Laborers Pension Plan dated March 28, 2002, Appendix Exh. 5; Certification of Archdiocese of Milwaukee dated April 10, 2002, Appendix Exh. 6. The certifications for these proposed sub-class representatives list *no purchases* of 8.375% Notes. (Although no order has yet been entered on Plaintiffs' Motion for Entry of Order to Replace Pages in the Consolidated Complaint, Bank of America nevertheless responds to the allegations in the Replaced Pages filed by the Plaintiffs on April 12, 2002, which include the Archdiocese of Milwaukee as a named plaintiff and sub-class representative for the 8.375% offering).

and therefore lacked standing. *See also Rathborne v. Rathborne*, 683 F.2d 914, 918 (5th Cir. 1982) (affirming dismissal of Rule 10b-5 claims pursuant to Rule 12(b)(6) because a plaintiff "does not have standing to recover under Rule 10b-5 unless the plaintiff can allege and ultimately establish that he himself was a purchaser or seller").

Similarly, to allege a claim under Section 11, a plaintiff "at least must allege that he or she purchased or acquired the security at issue." *In re Paracelsus Corp. Sec. Litig.*, 6 F.Supp.2d 626, 631 (S.D. Tex. 1998) (dismissing Section 11 claim based upon notes offering on 12(b)(6) grounds where plaintiffs failed to allege purchases of issuers' notes by any plaintiff). If a complaint fails to plead this "express statutory standing requirement[]" for an action under Section 11, it has failed to state a claim upon which relief can be granted and must be dismissed pursuant to Rule 12(b)(6). *Id. See also In re Storage Tech. Corp. Sec. Litig.*, 630 F.Supp. 1072, 1078 (D. Colo. 1986) (dismissing Section 11 claim on 12(b)(6) grounds where complaint failed to allege that any named plaintiff in securities class action purchased issuer's debt notes). Because there is no plaintiff who has standing to assert claims based upon the 8.375% Notes, Plaintiffs' Section 10(b) and Section 11 claims based on these notes fail as a matter of law.

IV. PLAINTIFFS FAIL TO STATE A SECTION 11 CLAIM AGAINST BANK OF AMERICA

A. Plaintiffs Fail To State Their Section 11 Claim With The Requisite Particularity

1. Rule 9(b) Applies To Plaintiffs' Section 11 Claim Against Bank of America Because It Sounds In Fraud

Since Rule 9(b) applies to all claims grounded in fraud, its strict particularity standards apply to *all* of Plaintiffs' claims against Bank of America, including the claims brought under Sections 11 and 15 of the 1933 Act. In this circuit as well as others, Rule 9(b), by its plain language, applies to "all averments" of fraud, whether or not plaintiffs label them as fraud causes of action. *See Melder,* 27 F.3d at 1097.[40] Here, Rule 9(b) applies because the allegations

[40] *See also Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 285 (3rd Cir. 1992) (Rule 9(b) applies to Section 11 claims sounding in fraud); *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405 (same); *Geiger*, 933 F.Supp. at 1189-90 (applying Rule 9(b) and dismissing Section 11 claim

supporting Plaintiffs' 1933 Act claims are the same allegations that support their fraud claims. *See, e.g.*, Cplt. ¶ 774 (alleging that Bank of America's assistance to Enron in raising "over $2 billion from the investing public via the sale of securities" was part of the alleged "fraudulent scheme" and "furthered Enron's fraudulent course of conduct"); Cplt. ¶ 781 (alleging that Bank of America "engaged and participated in the scheme to defraud" by, among other actions, its alleged involvement in the preparation of Registration Statements and Prospectuses which allegedly contained false and misleading statements).

Plaintiffs make a perfunctory attempt to side-step the application of Rule 9(b) to their Section 11 claim by purporting to exclude allegations sounding in fraud (Cplt. ¶ 1005) but that attempt is unavailing. The allegations regarding Bank of America's involvement in preparing the Registration Statements at issue in the Section 11 claim are an integral part of Plaintiffs' fraud allegations. Moreover, the Complaint repeatedly asserts, in conclusory fashion, that the investment banks knew that Enron's offering documents were false and misleading and that Enron was engaged in fraudulent conduct. *See, e.g.*, Cplt. ¶¶ 617, 619, 621-22, 624, 626-628, 630, 773, 784. In fact, many of these allegations, which indisputably sound in fraud, are ***explicitly*** incorporated into Plaintiffs' 1933 Act claims (Cplt. ¶ 1005). Plaintiffs cannot simultaneously incorporate specific paragraphs sounding in fraud that they assert are relevant to their Section 11 claim and evade the requirements of Rule 9(b). As this Court has explained, "boilerplate disclaimers of fraud are not dispositive of whether a claim under the 1933 Securities Act sounds in fraud." *Compaq,* slip op. at 75. Where plaintiffs' claims are "intrinsically demonstrative of fraud," plaintiffs may not purport to exclude any allegation that could be

---

where plaintiffs alleged that omission from prospectus was fraudulent). Unlike *Lone Star Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F.3d 363, 368 (5th Cir. 2001), in which plaintiffs withdrew their Section 10(b) claim and eliminated all of their fraud-based allegations, the Complaint here broadly alleges a fraudulent scheme upon which *all* claims are based. As this Court noted in *Compaq*, slip op. at 75 n.27, the decision in *Lone Star Ladies* "was based on the specific facts in that case." Moreover, as in *Melder*, which was cited by the court in *Lone Star Ladies*, Plaintiffs' "wholesale adoption" of specifically selected paragraphs containing allegations in their Section 11 Count which allege fraudulent conduct justifies the application of Rule 9(b) and the dismissal of the 1933 Act claims.

construed as fraud. *Compaq*, slip op. at 75;[41] *see also In re Stac Elecs.*, 89 F.3d at 1405 n.2 (plaintiff's "nominal efforts" to disclaim fraud allegations with respect to § 11 claims "are unconvincing where the gravamen of the complaint is plainly fraud and no effort is made to show any other basis for the claims levied at the Prospectus"); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996) ("It is the allegation of fraud, not the 'title' of the claim that brings the policy concerns [underlying Rule 9(b)]...to the forefront.") (citation omitted); *In re Ultrafem Inc. Sec. Litig.*, 91 F. Supp.2d 678, 690 (S.D.N.Y. 2000) (boilerplate disclaimer attempting to incorporate certain paragraphs of complaint "except to the extent" they sound in fraud fail); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp.2d at 1104 (plaintiff cannot avoid application of Rule 9(b) requirements to Section 11 claim by inserting boilerplate language into complaint).

2. Plaintiffs' Allegations Against Bank of America Based On Alleged Misstatements In Registration Statements and its Due Diligence Investigation Fail to Satisfy Rule 9(b)

As demonstrated above, Plaintiffs have failed to allege fraud with particularity as to Bank of America with respect to any Registration Statement. *See supra* Point II.A.2. The Complaint also alleges that Bank of America "did not make a reasonable and diligent investigation" of the statements contained in the Registration Statements and Prospectuses and that it did not possess "reasonable grounds for the belief that the statements contained in the Registration Statements and Prospectuses at the time they became effective were true." Cplt. ¶ 1013. These conclusory allegations are not supported by any facts. Plaintiffs set forth no details concerning the scope of Bank of America's due diligence and offer no explanation for

[41] In *Compaq*, this Court ultimately did not apply Rule 9(b) to Section 11 claims. In *Compaq*, however, two ***separate*** complaints were at issue -- one alleging Section 10(b) claims and a second complaint alleging *only* Section 11 claims. Thus, the allegations sounding in fraud were not in the Section 11 complaint and the Court accordingly noted that the two plaintiffs "should not be bound by each other's allegations." *Compaq*, slip op. at 75. Moreover, the Section 11 complaint in *Compaq* did not, as Plaintiffs do here, select *specific* paragraphs to incorporate into the Section 11 claim and then attempt to disclaim the fraud-based allegations in those very paragraphs.

why Bank of America's due diligence was purportedly deficient. Unsubstantiated allegations that an underwriter defendant failed to discover problems during due diligence, or discovered and chose to ignore them lack the specificity necessary to satisfy Rule 9(b). *See In re Valence Tech. Sec. Litig.*, No. C 94-1542-SC, 1995 WL 274343, at *12 (N.D. Cal. May 8, 1995) (conclusory allegations that underwriters failed to adequately carry out due diligence lacked the specificity required by Rule 9(b)); *Eickhorst*, 706 F.Supp. at 1092-93 (Rule 9(b) not satisfied where plaintiffs failed to offer any facts or circumstances supporting their due diligence allegations).

B. Bank of America is Not Liable Under Section 11 of the 1933 Act With Respect to the June 2000 7.875% Notes Offering Because it Had No Involvement in That Offering

Bank of America cannot be held liable under Section 11 of the 1933 Act with respect to the offering of $325,000,000 7.875% Notes on June 1, 2000 because it was not an underwriter of that offering.[42] Section 11 liability is limited by the statute to certain categories, including "every underwriter with respect to a security." 15 U.S.C. § 77k(a)(5). Under the 1933 Act, "[t]he term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, participates or has a direct or indirect participation in any such undertaking or participates or has a participation in the direct or indirect underwriting of any such undertaking." 15 U.S.C. § 77(b)(11). Since Bank of America did not participate either directly or indirectly in the offering of the 7.875% Notes, it was not an underwriter of the offering.

Indeed, the Complaint expressly identifies a different defendant as the underwriter of an offering of $325,000,000 in 7.875% Notes. Cplt. ¶ 236. As the prospectus reveals and as described below, Bank of America had no role in the offering. In several places, the Complaint incorrectly merges two separate debt offerings totaling $500,000,000 which were sold at

[42] Bank of America is not conceding that it was an underwriter of other offerings. It chooses not to raise that issue on this motion with respect to the other offerings.

different times, at different interest rates, generated different principal amounts, and were underwritten by different banks. Cplt. ¶¶ 781, 1006. On May 18, 2000, Enron filed a shelf prospectus for $500,000,000 of medium-term notes. *See* Appendix Exh. 1. On May 23, 2000, in a pricing supplement, Enron described an offering of $175,000,000 of 8.375% notes. *See* Appendix Exh. 1. That pricing supplement identifies Bank of America as an agent for the sale of the 8.375% Notes. *Id.*

On June 1, 2000, Enron filed a supplemental prospectus for a separate offering of $325,000,000 of 7.875% Notes. *See* Appendix Exh. 2. Bank of America is not mentioned anywhere in the 7.875% Notes prospectus, which identifies two other banks. *Id.* Plaintiffs' attempt to combine these two separate offerings for purposes of alleging liability against Bank of America is untenable. Since Bank of America was not an underwriter of the 7.875% Notes offering, Plaintiffs' Section 11 claim based on this offering should be dismissed.

C. Plaintiffs' Section 11 Claim with Respect to the 7% Exchangeable Notes is Barred Because the Complaint Fails to Plead Actual Reliance

Plaintiffs' Section 11 claim with respect to the 7% Exchangeable Notes fails as a matter of law because the Complaint does not plead actual reliance on the prospectus for the notes, as required by Section 11. The only proposed representative plaintiff who allegedly purchased the 7% Exchangeable Notes (Murray Van de Velde) did so more than two years *after* those securities were first issued, and the Complaint contains no allegations and no facts demonstrating that Mr. Van de Velde actually relied on the prospectus for the notes. *See* Certification of Mr. Van de Velde, dated Dec. 20, 2001, Appendix Exh. 8.[43]

[43] Amalgamated Bank, identified in Count I of the Complaint as one of the three proposed sub-class representatives for the 7.375% Notes issued on May 19, 1999, purchased its notes on November 2, 2000, *17 months* after the Registration Statement for those notes became effective. Appendix Exh. 7. Since the Complaint does not allege that Amalgamated Bank actually relied on the 7.375% Notes prospectus, Plaintiffs' claims stemming from Amalgamated Bank's alleged losses must also be dismissed.

A Section 11 plaintiff who acquires securities "after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement," as Mr. van de Velde did here, must plead and prove *actual reliance* on the material misstatements or omissions contained in that prospectus. 15 U.S.C. § 77k(a);[44] *Greenwald v. Integrated Energy, Inc.*, 102 F.R.D. 65, 71 n.2 (S.D. Tex. 1984) ("Reliance is required under the one year provision of Section 11(a) . . . ."); *see also In re Am. Cont'l Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992) (reliance requirement applicable to plaintiffs who acquired securities after the issuer made generally available an earning statement covering a period of twelve months after the effective date of the registration statement). This requirement prevents plaintiffs from asserting reliance on disclosures contained in a stale prospectus and registration statement when more timely and relevant financial information is available and likely had a greater influence on the purchase. *See Rudnick v. Franchard Corp.*, 237 F. Supp. 871, 873 n.1 (S.D.N.Y. 1965) (noting that "in all likelihood, the purchase and price of the security purchased after publication of [a subsequent earnings statement] will be predicated on that statement rather than on the information disclosed upon [the original] registration") (citing H.R. Rep. No. 1838 (1934)). Logic and fairness demand this result.

Here, the Complaint does not allege, much less support with facts, Mr. van de Velde's actual reliance on the 7% Exchangeable Notes prospectus. In fact, the financial information in the prospectus was more than three years old when Mr. van de Velde made his

---

[44] Section 11 (15 U.S.C. § 77k(a)) provides, in relevant part:

> If [a] person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

purchases on November 5 and 9, 2001. Mr. Van de Velde made his purchases in the wake of a flood of negative public reports about Enron, including news of a formal SEC investigation and shareholder lawsuits (including some that are part of this consolidated case) alleging that Enron's financial statements were materially misleading.

Because Mr. Van de Velde did not and could not have relied on the prospectus in light of additional information about Enron that became available between the issuance of the prospectus and his purchases, he is barred from recovery under Section 11. Since Plaintiffs are therefore left without a representative plaintiff with standing to assert the Section 11 claim with respect to the 7% Exchangeable Notes, that claim must be dismissed. *In re Paracelsus Corp.*, 6 F. Supp. 2d at 631 ("[A]n individual plaintiff who lacks standing to assert a claim on his or her own behalf cannot avoid dismissal by purporting to maintain the action on behalf of a class of which he or she is not a member").

D. Plaintiffs Lack Standing to Bring Their 1933 Act Claims With Respect To The 7% Exchangeable Notes Because There Is No Allegation Of A Purchase In The Initial Offering

Plaintiffs' Section 11 claims with respect to the August 10, 1999 offering of 7% Exchangeable Notes should be dismissed for an additional reason. As noted above, the certification filed by Mr. Van de Velde, the plaintiff purporting to represent the sub-class for the 7% Notes offering, reveals that he did not purchase in the initial offering of those notes. *See* Certification of Mr. Van de Velde dated Dec. 20, 2001, Appendix Exh. 8. Only persons who purchase securities sold pursuant to a registration statement have standing to bring a claim under Section 11 of the 1933 Act. *See* 15 U.S.C. §§ 77k.

Plaintiffs base their Section 11 claim on the allegation that the proposed sub-class representatives purchased Enron securities "traceable to a false and misleading Registration Statement." Cplt. ¶ 1014. In the interest of avoiding repetition, Bank of America expressly adopts and incorporates herein the arguments set forth in the memorandum of law in support of the motion to dismiss filed by Citigroup that only purchasers in the original public offering, and

not those who purchase subsequently in the open market, have standing to bring Section 11 claims. The following arguments further support the conclusion set forth in Citigroup's brief.

The structure and text of the 1933 Act as a whole demonstrate that open market purchasers lack standing to assert Section 11 claims.[45] Open market transactions are exempt from registration statement requirements. 15 U.S.C. § 77d.

In *Gustafson*, the Supreme Court stated: "[w]e are reluctant to conclude that § 12(2) creates vast additional liabilities that are quite independent of the new substantive obligations the Act imposes. ***It is more reasonable to interpret the liability provisions of the 1933 Act as designed for the primary purpose of providing remedies for violations of the obligations it created.***" *Gustafson,* 513 U.S. at 571-72 (citations omitted) (emphasis added). Thus, liability cannot flow under Section 11 for misstatements and omissions in a registration statement if the transactions at issue are exempt from the registration requirements of the 1933 Act. Yet that is the result required by tracing.[46]

---

[45] In analyzing the remedial provisions of the 1933 Act, the Supreme Court has held that "[t]he 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Rather, the issue of standing to sue under Section 11 of the 1933 Act should be construed in light of all the other provisions of Section 11 and the 1933 Act in general. *See id.*

[46] The interplay between the stop order provisions of the 1933 Act and the exemptions listed above further demonstrate that tracing provides a remedy beyond that allowed by the statute. Section 8 of the 1933 Act allows the SEC to issue a "stop order" suspending the effectiveness of the registration statement if it appears to the SEC that the registration statement contains an untrue statement of material fact or omits to state any material fact. The practical effect of a stop order is to prevent further distribution of securities being issued pursuant to the defective registration statement, but a stop order does not prevent open market trading of securities already distributed, because such transactions are exempt from registration. Congress allowed public investors to continue to trade in the open market "even though a stop order against further distribution of such securities may have been entered." H.R. Rep. No. 73-85, 73rd Cong., 1st Sess., at 16 (1933) (emphasis added). Under the tracing theory, any open market purchaser, even one who purchases after the SEC has issued a stop order suspending the effectiveness of the defective registration statement, may sue because they purchased securities originally issued pursuant to a defective registration statement. Such a result is illogical – Congress could not have intended to establish liability for misstatements and omissions in a suspended registration statement.

Consequently, because the proposed representative plaintiff for the 7% Exchangeable Notes does not have standing to bring a Section 11 claim based upon that offering, this claim must be dismissed.

V. PLAINTIFFS FAIL TO PLEAD CONTROL PERSON LIABILITY AGAINST BANK OF AMERICA

Plaintiffs allege that "each defendant violated, and/or in violation of § 15 of the 1933 Act controlled a person who violated, § 11 of the 1933 Act." Cplt. ¶ 1014. Although the Complaint is not the epitome of clarity, Bank of America assumes Plaintiffs are attempting to allege that Bank of America is liable as a "controlling person" of a person that violated Section 11.[47]

To establish control person liability, a plaintiff must show that the alleged control person, at a minimum, possessed "the power to control [the primary violator]." *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 868 n.17 (citing *Abbott v. Equity Group Inc.*, 2 F.3d 613, 620 (5th Cir. 1993)). "Control" means the "possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person . . . ." *Abbott*, 2 F.3d at 619 n. 15 (quoting 17 C.F.R. § 230.405(f)). Some courts in the Fifth Circuit have required plaintiffs to also show that the alleged control person "induced or participated in the alleged violation." *See, e.g., Dennis v. Gen. Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990).[48] Regardless of the minimum standard required to establish control person liability, Plaintiffs' conclusory control person allegations fail to satisfy it. In fact, Plaintiffs attempt to stretch the control person provisions of the securities laws far beyond their reasonable limits.

---

[47] The control person liability provisions of Section 15 of the 1933 Act and Section 20(a) of the 1934 Act are interpreted the same way. *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 868 n.17. The Complaint's allegations in the Section 20(a) count (Cplt. ¶¶ 992-97) are insufficient for the same reasons the Section 15 allegations are insufficient.

[48] *Cf. Abbott*, 2 F.3d at 620 (finding that actual power over the controlled person was required at a minimum to support a claim of control person liability, and declining to address whether a showing that such power was exercised is also required).

First, there is no differentiation among the controlled persons and the controlling persons. In fact, Plaintiffs appear to be alleging that each Defendant controlled every other Defendant and every Section 11 violator. Cplt. ¶ 1014. This proposition is, on its face, absurd. In any case, Plaintiffs allege no facts to support their conclusory allegation that Bank of America controlled any of the other defendants, nor can they.

Second, Plaintiffs' allegations of a business relationship between Bank of America and Enron and the individual Enron defendants simply does not establish control. The conclusory allegations that Bank of America provided "commercial and investment banking services" to Enron, loaned Enron money, and "helped structure and finance" one or more of Enron's partnerships or SPEs, are professional services commonly rendered by financial institutions. Cplt. ¶ 773. *See supra* at p. 15. Such allegations do not reflect any power on the part of Bank of America to direct or cause the direction of management or policies of Enron or the individual Enron Defendants. Indeed, similar allegations have been rejected as a basis to assert control person liability. *See Sloane Overseas Fund Ltd.*, 941 F.Supp. at 1379 (rejecting Section 15 and Section 20(a) liability where underwriter founded issuer, owned stock in issuer, was a creditor of issuer at time of issuer's formation, was the lead underwriter of issuer's debt securities offering and underwriter officer was Vice President of issuer's Board of Directors). Similarly, the allegations that Bank of America executives "constantly interacted" with Enron executives do not establish that Bank of America controlled Enron or the individual defendants. Cplt. ¶ 774; *see In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d at 1122 (rejecting Section 15 liability where plaintiffs alleged merely that underwriters had "constant access" to issuer and its executives and had a "close association" with issuer).

Third, although Plaintiffs allege that "the defendants," without being any more specific, "created, structured, financed and used" and "clandestinely controlled" partnerships to perpetrate fraud, Cplt. ¶ 4, Plaintiffs later admit that ***"Enron and Enron's CFO Fastow controlled"*** the two LJM partnerships. Cplt. ¶ 23 (emphasis in original). Indeed, the crux of Plaintiffs' case is that Enron and the individual defendants controlled the partnerships and SPEs,

and that Enron itself was uncontrollable. This premise is inconsistent with Plaintiffs' conclusory allegation that Bank of America somehow controlled Enron and the individual defendants.

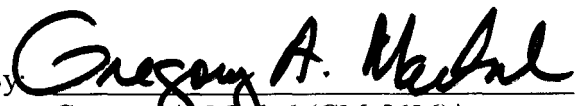
Even the most liberalized notice pleading standards require at least some facts in support of the assertion of control person liability. *See In re Software Toolworks, Inc. Sec. Litig.*, No. C-90-2906 FMS, 1991 WL 319033, *5 (N.D. Cal. June 17, 1991) (rejecting control person liability of underwriter where underwriter's former employee was president of issuer and member of Board of Directors, and holding that "[e]ven the liberal notice pleading requirements of the Federal Rules require more than simply labeling [the underwriter] a 'controlling person'"). Because Plaintiffs allege no such facts, their control person claims against Bank of America should be dismissed.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the Complaint against Bank of America in its entirety, with prejudice.

Respectfully submitted,

BROBECK, PHLEGER & HARRISON LLP

By: 

Gregory A. Markel (GM-5626)*
(Attorney-in-Charge)
Ronit Setton (RS-2298)
Nancy Ruskin (NR-2428)
Stephen M. Knaster Cal. Bar No. 146236
Brobeck, Phleger & Harrison LLP
1633 Broadway, 47th Floor
New York, NY 10019
Telephone:(212) 581-1600
Facsimile: (212) 586-7878

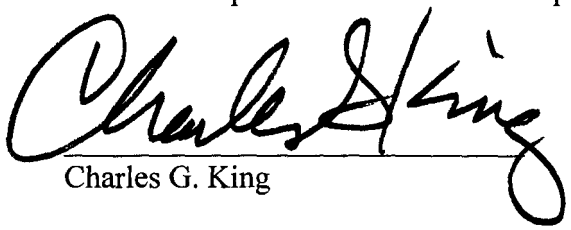
Paul R. Bessette
Texas Bar No. 02263050
S.D. Tex. Bar No.: 22453
Brobeck, Phleger & Harrison LLP
4801 Plaza on the Lake
Austin, Texas 78746
Telephone:(512) 330-4000
Facsimile: (512) 330-4001

Charles G. King
Texas Bar No. 11470000
S.D. Tex. Bar No.: 01344
King & Pennington LLP
711 Louisiana Street,
Suite 3100
Houston, Texas 77002
Telephone: (713) 225-8404
Facsimile: (713) 225-8488

*Signed by Charles G. King with permission

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 8th day of May, 2002, a true and correct copy of the foregoing memorandum was served on all counsel pursuant to the Court's April 4, 2002 Order.



Charles G. King